

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

January 24, 2020

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

MAUI

Denial of Petition for Contested Case Hearing filed by Sierra Club of Hawai'i on October 18, 2019, Regarding October 11, 2019 Agenda Item D-1, Continuation of Revocable Permits S-7263, S-7264, S-7265 and S-7266 to Alexander & Baldwin, Inc. and East Maui Irrigation Co., Ltd., for Water Use.

BACKGROUND

At its meeting on October 11, 2019 under agenda item D-1, the Board approved as amended the continuation of revocable permits for the use of water statewide. Included in the approval were four revocable permits, S-7263, S-7264, S-7265 and S-7566, to Alexander and Baldwin, Inc. (A&B) and East Maui Irrigation Co., Ltd. (EMI) to divert water from streams located on State land in east Maui. The water is diverted from east Maui to central Maui for uses that include agriculture and municipal use under the County of Maui, Department of Water Supply. An application for a long-term lease of water was previously filed by A&B. A Draft Environmental Impact Statement (DEIS) was published in the Office of Environmental Quality Control Environmental Notice on September 23, 2019.

The board received extensive written testimony beforehand and heard several hours of oral testimony at the meeting. A representative for the Sierra Club of Hawai'i (Sierra Club) orally requested a contested case during the meeting. Following an executive session, the Board voted to deny the request for contested case and proceeded to approve as amended the continuation of the revocable permits to A&B and EMI for one year. On October 18, 2019, the Department received a written petition for contested case from Sierra Club, filed through their attorney. A copy of the contested case petition is attached as Exhibit A.

A lawsuit challenging the Board's 2018 approval of the holdover of the A&B/EMI revocable permits was filed by Sierra Club and is currently pending before Circuit Court of the First Circuit, with a trial date of May 1, 2020.

DISCUSSION

An administrative agency must only hold a contested-case hearing when it is required by law, which means that the contested-case hearing is required by (1) statute, (2) administrative rule, or (3) constitutional due process. *Mauna Kea Anaina Hou v. BLNR*, 136 Hawai'i 376, 390, 363 P.3d 224, 238 (2015). When a contested-case hearing is required by statute or administrative rule, the analysis is simple. Whether a contested-case hearing is required by constitutional due process is a much more complicated analysis. The petition does not identify any statute or administrative rule that requires that a contested-case hearing be held but rather relies upon constitutional due process.

There is a two-step process in determining whether a person is entitled to a contested-case hearing under constitutional due process. First, a court must consider "whether the particular interest which claimant seeks to protect by a hearing is 'property' within the meaning of the due process clauses of the federal and state constitutions." *Flores v. BLNR*, No. SCAP-17-59, 2018 WL 3751294, at *11 (Haw. Aug. 8, 2018) (citation and internal brackets omitted). Second, if a court "concludes that the interest is 'property,' th[e] court analyzes what specific procedures are required to protect it." *Id.*

Step one merely requires the court to determine whether an appellant seeks to protect a constitutionally cognizable property interest. *Flores*, 2018 WL 3751294, at *12. To have such a property interest, a person "must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Sandy Beach Def. Fund v. City & Cnty. of Honolulu*, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989). Legitimate claims of entitlement that constitute property interests "are not created by the due process clause itself. Instead, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" *Flores*, 2018 WL 3751294, at *11 (citation and internal brackets omitted).

If step one of the analysis is satisfied, then step two analyzes how the government action would affect that interest with and without procedural safeguards. With respect to the step two, the Hawai'i Supreme Court has been careful to emphasize that "[d]ue process is not a fixed concept requiring a specific procedural course in every situation." *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. Due process "is flexible and calls for such procedural protections as the particular situation demands." *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The touchstone of due process is "notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." *Id.*

In determining what procedures are necessary to satisfy due process, the administrative agency must examine and balance three factors:

(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.

Flores, 2018 WL 3751294, at *12.

Step One: Sierra Club Fails to Identify a Constitutionally Cognizable Property Interest

HAR § 13-1-29(b) provides that a formal petition for a contested-case hearing must include, among other things, a statement of “[t]he nature and extent of the requestor’s interest that may be affected by board action on the subject matter that entitles the requestor to participate in a contested case[.]”

Sierra Club states in their petition that it is “a membership organization advocating for the protection of Hawai`i’s unique natural environment... Our members in East Maui are directly affected by the actions of this Board on item D-1... Our members live along and draw water from the streams in the license area for residential and farming purposes. Our members enjoy the streams in the license area for their recreational and spiritual importance. This includes, but is not limited to, hiking, fishing, swimming, and other creational uses in and around the streams of the proposed license area. Our members reside near, and use the stream water from the following streams: Hanehoi, Waipio, Ho`olawa, Hanawana, Mokupapa, Kailua, Makapipi, and Honokola.”

Recreational, aesthetic, and environmental interests, standing alone, are not constitutionally cognizable property interests. *Sandy Beach*, 70 Haw. at 377, 773 P.2d 250 (1989) (aesthetic and environmental interests do not rise to the level of ‘property’ within the meaning of the due process clause). This falls squarely into the *Sandy Beach* category of interests that merely express an abstract need or desire of the claimant.

Being the beneficiary of the public trust and/or the ceded-land trust is not a constitutionally cognizable property interest. *Wille v. BLNR*, No. CAAP-12-496, 2013 WL 1729711, at *5 (App. Apr. 22, 2013), cert. denied, No. SCWC-12-496, 2013 WL 4779500 (Haw. Sept. 4, 2013) (“[O]ur courts have never held that an individual’s status as the beneficiary of the “public trust” constitutes a cognizable property interest warranting due process protection.”); *Keahole Def. Coalition, Inc. v. BLNR*, 110 Hawai`i 419, 432, 124 P.3d 585, 598 (2006) (economic interests are not a constitutionally protected property interest).

An interest asserted by Sierra Club that would require substantial analysis is the claim that its members have a property interest in a clean and healthful environment pursuant to Article XI, Section 9 of the Hawai`i Constitution. However, based upon the specific issues in this case, and the lack of specific claims of injury, Sierra Club does not have a property interest in a clean and healthful environment in this instance and, indeed, does not even assert an actual claim seeking to vindicate that interest.

In the fairly recent Hawai`i Supreme Court case of *In re Application of Maui Electric Company, Ltd.*, 141 Hawai`i 249, 408 P.3d 1 (2017), the Public Utilities Commission (“PUC”) denied the Sierra Club’s motion to intervene in a proceeding concerning a power purchase agreement based upon the Sierra Club’s argument that the proceedings impacted the amount of coal that a power plant could burn and air quality. The Supreme Court considered article XI, section 9 of the Hawai`i Constitution, which states: “Each person has the right to a clean and healthful

environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection, and enhancement of natural resources.” The Supreme Court held that the Sierra Club had a substantive right to a clean and healthful environment because, in that particular instance, the right was defined by a law relating to environmental quality: that, pursuant to HRS § 269-6, the PUC was required to consider the impact of the State’s reliance on fossil fuels on the level of greenhouse gas emissions and the need to reduce reliance on fossil fuels in its decision-making:

“We therefore conclude that HRS Chapter 269 is a law relating to environmental quality that defines the right to a clean and healthful environment under article XI, section 9 by providing that express consideration be given to reduction of greenhouse gas emissions in the decision-making of the Commission. Accordingly, we hold that Sierra Club has established a legitimate claim of entitlement to a clean and healthful environment under article XI, section 9 and HRS Chapter 269.”

Id. at 264, 408 P.3d at 16.

The agenda item that Sierra Club contests relate to revocable permits for the use of water, which are granted pursuant to HRS § 171-58. Chapter 171, HRS, is entitled: “Public Lands, Management and Disposition of.” Looking at the provisions of Chapter 171, it is clear that its provisions relate to the internal management of the Department of Land and Natural Resources, the technical methods of encumbering lands, and appraisal processes. Chapter 171 is not a chapter concerning the control of pollution or the conservation, protection, and enhancement of natural resources—a law relating to “environmental quality.”

Looking closely at the actual statute at issue here, HRS § 171-58 provides the Board with the power to issue permits for the temporary use of state water on a month-to-month basis for no more than one year and the authority to continue permits for additional one-year periods. HRS § 171-1 defines “land” as including “all interests therein and natural resources including **water**, minerals, and all such things connected with land, unless otherwise expressly provided.” Therefore, this is a statute relating to technical land management, not environmental quality.

A contrary result cannot be what the Hawai‘i Supreme Court intended. The Supreme Court justices in Maui Electric split three-to-two. In his dissent, Chief Justice Recktenwald concluded that the majority’s holding “will create uncertainty regarding what constitutes a property interest, and may have unintended consequences.” 141 Hawai‘i at 278, 408 P.3d at 30 (Recktenwald, C.J., dissenting). If Maui Electric were to be read as broadly as Sierra Club suggests, it is not inconceivable that virtually everything that the Department of Land and Natural Resources does would be the subject of a contested-case hearing. We do not believe that the Hawai‘i Supreme Court could have intended such a draconian result that would severely hamstring the ability of the Department of Land and Natural Resources to accomplish any action without a contested-case hearing—from the mundane to the controversial—if any single member of the public would seek to object to a given action.

Sierra Club also asserts that members draw water from the streams in the license area for residential and farming purposes. While that may indicate a constitutionally cognizable property

interest exists, no additional information or justification is provided beyond that general statement. Rather, Sierra Club contends that the Board failed in its duty to protect public trust resources by its approval of the continuation of the revocable permits, due to 1) A&B and EMI failure to comply with permit conditions previously required by the Board, 2) insufficient information provided by A&B and EMI regarding its diversion and use of the water, 3) the lack of sufficient justification by A&B and EMI for the continued diversion of water and 4) the lack of sufficient information necessary for the Board to adequately address the impact of the continued diversion of water. However, despite the concerns raised by Sierra Club, their petition does not articulate how such claims result in a negative impact on a clean and healthful environment.

Step Two: Even if Sierra Club Identified a Constitutionally Cognizable Property Interest, Sierra Club is Not Entitled to a Contested-Case Hearing Based Upon the Specific Factual Situation at Issue

For the sake of argument, even if Sierra Club established that their members are seeking to vindicate a constitutionally cognizable property interest, Sierra Club is not entitled to a contested-case hearing. Again, if a petitioner asserts a constitutionally cognizable property interest, that is not the end of the inquiry as to whether a contested-case hearing is required. The touchstone of due process is “notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.” *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. To determine what process is due, the administrative agency must examine and balance three factors:

- (1) the private interest which will be affected;
- (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and
- (3) the governmental interest, including the burden that additional procedural safeguards would entail.

Flores, 2018 WL 3751294, at *12.

Regarding the two potential private interests that may be affected by the Board's action (a clean, healthful environment and Sierra Club members drawing water from the affected streams), neither potential interest is substantial in character compared to more significant actions. A revocable permit is a temporary month-to-month permit for the use of water. Furthermore, any use of water is subject to the instream flow standards established by the Commission on Water Resource Management in its Findings of Fact, Conclusions of Law & Decision and Order dated June 20, 2018. Additionally, Sierra Club's petition does not articulate how those potential interests are adversely affected by the continuation of the revocable permit.

Second, staff recommends that the Board find that the risk of an erroneous deprivation of such an interest through Sunshine Law procedures is minimal and that a contested-case hearing would not add significant value. At the Sunshine meeting of the Board, Sierra Club was provided notice of the meeting, as well as the staff submittal, and submitted substantial testimony in

opposition to the agenda item. Additionally, Sierra Club representatives testified in person at the meeting and was not prevented from making any point. This is substantial process.

It is significant that in Maui Electric, the issue was whether the Sierra Club should be permitted to intervene or participate in an ongoing hearing. In other words, if not permitted to intervene, the Sierra Club would not be given an opportunity to be heard. In this case, Sierra Club has been given a substantial opportunity to be heard by providing written and oral testimony. It is improbable that Sierra Club would gain significant value in being allowed to participate in a full contested-case hearing.

Third, staff recommends that the Board find that the governmental interest, including the burden that holding a contested-case hearing would entail, weighs very heavily in favor of rejecting the contested-case petition. Contested-case hearings are expensive and time-consuming endeavors for the staff of the Department of Land and Natural Resources and the Board. The Thirty Meter Telescope contested-case hearing obviously sets the standard for time and expense, as it took many weeks and cost over \$500,000 in direct costs, including fees, travel costs, transcripts, meals, venue, and lodging, not counting the time spent by staff of Land Division, OCCL, DOCARE, and the Department of the Attorney General. The cost for retaining hearing officers and court reporters can be thousands of dollars for even one-day contested-case hearings and may go into the many tens-of-thousands of dollars, once again not counting staff and attorney time. Even in this one instance, Sierra Club has failed to justify why the Department of Land and Natural Resources should bear such costs and spend many hours of staff time on a contested-case hearing of relatively limited import.

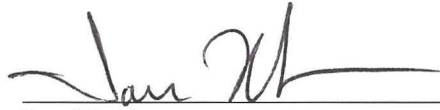
Finally, staff notes that the revocable permit is a temporary interim measure while A&B and EMI complete the water lease application requirements. The water leasing process is extensive, with multiple opportunities for public review and comment. The applicants have prepared a draft environmental impact statement (EIS) has been published and Sierra Club submitted comments. The final EIS is subject to acceptance by the Board in an open, sun-shined meeting allowing for further public input. Finally, approval of the water lease itself is determined by the Board in an open, sun-shined meeting, allowing for a further opportunity for public review and testimony.

Therefore, staff recommends the Board find that even if Sierra Club asserted a constitutionally protected property interest, after examining and balancing the three Sandy Beach factors, Sierra Club is not entitled to a contested-case hearing.

RECOMMENDATION:

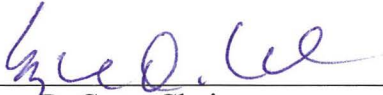
That the Board deny the Petition for a Contested Case Hearing filed by the Sierra Club of Hawai'i on October 18, 2019.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Ian Hirokawa", written over a horizontal line.

Ian Hirokawa
Special Projects Coordinator

APPROVED FOR SUBMITTAL:

A handwritten signature in blue ink, appearing to read "Suzanne D. Case", written over a horizontal line.

Suzanne D. Case, Chairperson

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STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

RECEIVED

2019 OCT 18 PM 4:07

PETITION FOR A CONTESTED CASE HEARING
DEPT. OF LAND & NATURAL RESOURCES
STATE OF HAWAII

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

- File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:
Department of Land and Natural Resources
Administrative Proceedings Office
1151 Punchbowl Street, Room 130
Honolulu, Hawaii 96813
Phone: (808) 587-1496, Fax: (808) 587-0390
- DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://dlnr.hawaii.gov/forms/contested-case-form/>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to § 13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.
- All materials, including this form, shall be submitted in three (3) photocopies.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Sierra Club of Hawai'i	2. Contact Person Marti Townsend	
3. Address P.O. Box 2577	4. City Honolulu	5. State and ZIP HI, 96803
6. Email hawaii.chapter@sierraclub.org	7. Phone 808-538-6616	8. Fax

B. ATTORNEY (if represented)

9. Attorney Name David Kimo Frankel	10. Firm Name N/A	
11. Address 1638-A Mikahala Way	12. City Honolulu	13. State and ZIP HI, 96816
14. Email davidkimofrankel@hawaiiantel.com	15. Phone 808-345-5451	16. Fax

C. SUBJECT MATTER	
17. Board Action Being Contested CONTINUATION OF REVOCABLE PERMITS S-7263 (TAX MAP KEY (2) 1-1-001:044), S-7264 (TAX MAP KEYS (2) 1-1-001:050, 2-9-014:001, 005, 011, 012 & 017) AND S-7265 (TAX MAP KEY (2) L-L-002:POR.002) TO ALEXANDER AND BALDWIN, INC., AND S-7266 (TAX MAP KEYS (2) 1-2-004:005 & 007) TO EAST MAUI IRRIGATION COMPANY, LIMITED, FOR WATER USE ON THE ISLAND OF MAUI	
18. Board Action Date October 11, 2019	19. Item No. D-1

20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action

The Sierra Club is a membership organization advocating for the protection of Hawai'i's unique natural environment. Formed in 1968, the Hawai'i Chapter of the Sierra Club has over 5,000 members throughout the Hawaiian Islands. Our members in East Maui are directly affected by the actions of this Board on item D-1, which seeks to continue temporary licenses, also known as the holdover of revocable permits, to Alexander and Baldwin (A&B) for the diversion of public trust water resources from streams in East Maui. Our members live along and draw water from the streams in the license area for residential and farming purposes. Our members enjoy the streams in the license area for their recreational and spiritual importance. This includes, but is not limited to, hiking, fishing, swimming, and other recreational uses in and around the streams of the proposed license area. Our members reside near, and use the stream water from the following streams: Hanehoi, Waipio, Ho'olawa, Hanawana, Mokupapa, Kailua, Makapipi, and Honokolā.

The rights of our members relevant to these streams are protected by the Hawai'i State Constitution and state law. Sierra Club's members have rights to a clean and healthful environment under article XI, section 9 of the Constitution, which mandates a contested case hearing whenever the State makes binding decisions under "laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources." *In re Application of Maui Elec. Co., Ltd.* ("MECO"), 141 Hawai'i 249, 264, 408 P.3d 1, 16 (2017) (quoting Haw. Const. art. XI, § 9); see also, *Flores v. Bd. of Land & Natural Res.*, 143 Hawai'i 114, 424 P.3d 469 (2018). To be clear, this right is created and protected by the Hawai'i State Constitution and protected by state statute as well.

BLNR actions related to "conservation, protection, and enhancement of natural resources" are governed by Hawai'i Revised Statutes Chapter 171, 205A, and 343. The public trust doctrine is enshrined in Article XI, section 1 of the state constitution. This constitutional provisions states in full:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

Haw. Const. art. XI, §1. BLNR may not continue revocable permits without first ensuring that the minimum expectations of the public trust doctrine are satisfied. Hawai'i Revised Statutes

21. Any Disagreement Petitioner May Have with an Application before the Board

The Sierra Club opposes the renewal of these permits because:

- (a) Alexander and Baldwin has failed to provide sufficient information to the BLNR as to how much water it is taking from each stream;
- (b) BLNR does not know how much water is being taken from each stream and if any water is being “wasted” by being taken from one stream and “dumped” into other streams where it overwhelms the stream channels, undercuts the banks and sends debris down stream to impact homesteads, farms and ocean water quality;
- (c) Alexander and Baldwin has failed to comply with conditions that BLNR has previously imposed;
- (d) the Environmental Impact Statement is not complete. The EIS has been unnecessarily delayed and as a result the Land Board does not have the information it needs to assess the impact of diversions prior to its decisionmaking, as Chapter 343 requires;
- (e) the proposal violates HRS chapters 171, 205A and 343;
- (f) granting the request violates the BLNR’s public trust responsibilities;
- (g) A&B has failed restore all the streams it promised to restore more than two years ago and BLNR has failed to impose any deadlines or require consultation with wildlife agencies and local residents and cultural practitioners for needed alterations of diversion structures and more complete restoration of streams that allow native species to thrive.

The basic issue raised in this proceeding is fulfilling BLNR’s duty under the constitutional public trust and state law to protect public trust resources. At issue in the action before the Land Board includes, but is not limited to:

- the impacts of diversions on the stream and surrounding ecosystem as well as water quality, and feasible action to mitigate or eliminate these impacts;
- the impacts of diversions on other uses of each stream including recreational and aesthetic enjoyment, and feasible action to mitigate or eliminate these impacts;
- the actual water needs of Alexander and Baldwin’s central Maui lands,
- practicable timelines for the restoration of stream connectivity, historical diversions no longer needed, and other restoration and mitigation activities,
- the amount of water actually needed to maintain land uses in central Maui, continued domestic County water use, and agricultural County water uses.

21. Continued from previous question:

- the amount of water generated from lands in East Maui privately owned by Alexander and Baldwin,
- proposals and timelines for the removal of historic diversions,
- consultation with downstream residents and farmers to minimize harm to them,
- culturally and environmentally appropriate amounts of stream flow diversion, if any.

Alexander and Baldwin seeks yet another continuation of holdovers on four revocable permits to access the public lands in East Maui for the purpose of diverting water from streams. The Sierra Club opposes the continuation of these revocable permits for the reasons outlined in or testimony as well as those argued in Civ. No. 19-1-0019-01 JPC.

BLNR has the duty to protect public trust resources in all the streams within the area encompassed by the revocable permits, not just those addressed by CWRM last year.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to

The Sierra Club requests that the permits be denied. The applicant has not demonstrated sufficient need to justify the continued diversion of water from east Maui.

23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest

We provided eye-witness accounts and photographic evidence confirming that conditions imposed on prior permits have not been satisfied. In a contested case hearing, we will provide the Board with additional direct testimony from residents directly affected by the outcome of agenda item D-1. Our evidence will demonstrate which streams remain diverted, the location of debris, where connectivity is needed but is lacking, and where stream water is being wasted. We will also show that the applicant has made changes to stream flows without consideration to the affect on downstream residents and farmers. Our participation in a contested case hearing will help to ensure this Board has all the information it needs to make a decision that fully protects the public's interests and satisfies the Board's public trust obligations per the Hawai'i State Constitution.

24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

Relevant statutes and constitutional provisions covered in this request are: HRS 171-6, 171-7, and 171-58; Hawai'i Constitution Article XI, section 1, 2, 7, and 9.

✓ Check this box if Petitioner is submitting supporting documents with this form.

✓ Check this box if Petitioner will submit additional supporting documents after filing this form.

Marti Townsend

Petitioner or Representative (Print
Name)



Signature

October 17, 2019

Date